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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: PHILADELPHIA Date: AUG 28 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U. S citizen spouse, [redacted] The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his spouse and U.S. citizen (step)sons.

The record reflects that the applicant entered the United States without inspection in 1988. The applicant and his spouse were married in the United States on November 4, 1999. The Form I-130 petition was filed on or about December 17, 1999 and approved on May 17, 2000. The applicant filed an initial Application to Register Permanent Residence or Adjust Status (Form I-485) on April 20, 2001. The applicant filed an initial Application for Waiver of Grounds of Inadmissibility (Form I-601) on or before December 16, 2002. The Acting District Director (Philadelphia) concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of Acting District Director Denying Form I-601*, dated February 10, 2003. The Acting District Director also denied the applicant's adjustment application on the basis that he was inadmissible for having committed two crimes of moral turpitude. *Decision of Acting District Director Denying Form I-485*, dated February 10, 2003. On or about March 14, 2003, the applicant's former counsel filed a motion to reopen and reconsider the decision to deny the applicant's waiver application. On December 29, 2005, the Interim District Director (Philadelphia) dismissed the motion.

On December 7, 2005, the applicant was served a Notice to Appear (Form I-862) before an immigration judge in removal proceedings. The record reflects that the applicant is in removal proceedings as of the date of this decision.

The applicant filed a new Form I-485 adjustment application and a Form I-601 waiver application on or before December 4, 2007. The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of Field Office Director Denying Form I-601*, dated March 21, 2008. The Field Office Director also denied the applicant's adjustment application on the basis that he was inadmissible for having committed crimes involving moral turpitude. *Decision of Acting District Director Denying Form I-485*, dated March 21, 2008. Counsel has appealed the decision to deny the applicant's waiver application.

On appeal, counsel contends that the Field Office Director chose to ignore substantial evidence of extreme hardship, failed to consider the relevant hardship factors in aggregate, relied on irrelevant evidence, and applied an incorrect standard of law by requiring "conclusive" evidence. *Applicant's Brief in Support of Appeal*, dated May 13, 2008. In support of the appeal, counsel submits a "psychological hardship evaluation" from [redacted] dated November 20, 2006; an affidavit from the applicant's spouse dated April 29, 2008 with previously submitted affidavit attached; a letter from [redacted] LSW, dated May 12, 2008; and an affidavit from the applicant's parents. The record also contains, among other documents, tax returns

and other tax records; employment records, school records; health insurance records and copies of prescriptions. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) In general.— . . .[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general.
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> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

The BIA and U.S. courts have found that it is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft,* 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS,* 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision . . . encompasses at least some violations that do not involve moral turpitude").

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), the court looks to the "record of conviction" to determine if the crime involves moral turpitude. *Matter of Ajami,* 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi,* 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang,* 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: "[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. U.S.,* 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales,* [redacted] It is also important to note that the record

of conviction does not include the arrest report. *See In re Teixeira,* 21 I&N Dec. 316, 319-20 (BIA 1996).

The record shows that the applicant was arrested in Reading, Pennsylvania on August 20, 1994 and charged with burglary, criminal trespass, theft by unlawful taking or disposition, receiving stolen property, conspiracy and criminal mischief. The applicant was convicted on March 31, 1995 in the Court of Common Pleas for Berks County, Pennsylvania of Criminal Trespass in violation of section 3503(a)(1)(ii) of volume 18 of the Pennsylvania Consolidated Statutes (Pa.C.S.), of Receiving Stolen Property in violation of 18 Pa.C.S. § 3925(a), and of Criminal Conspiracy to Commit Criminal Trespass and to Receive Stolen Property in violation of 18 Pa.C.S. § 903(a)(1)(2). The applicant was sentenced to a minimum of 20 days and a maximum of 23 months in jail and 24 months of probation.

Trespass has been found to be a crime involving moral turpitude where intent to commit a crime of moral turpitude is an element of the crime. *See Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979) (intent to commit petty larceny). The applicant violated 18 Pa.C.S. § 903(a)(1)(2) when he, "knowing that he was not licensed or privileged to do so, [broke] into a building or occupied structure . . . ." Because intent to commit a crime of moral turpitude was not an element of 18 Pa.C.S. § 903(a)(1)(2) at the time of the applicant's conviction, the AAO cannot conclude that this conviction is a crime involving moral turpitude.

Receiving stolen property with guilty knowledge has been found to be a crime involving moral turpitude. *See De Leon-Reynoso v. Ashcroft*, 293 F.3d 633 (3rd Cir. 2002) (receiving stolen property in violation of Pennsylvania statue required subjective belief that the property was stolen, and therefore, is a CIMT); *see also U.S. v. Castro*, 26 F.3d 557 (5th Cir. 1994). The applicant violated 18 Pa.C.S. § 3925(a) when he did "intentionally receive, retain or dispose of movable property" of another "knowing that it had been stolen, or believing that it had probably been stolen . . . ." Accordingly, the applicant's conviction for receiving stolen property is crime involving moral turpitude that renders the applicant inadmissible.

Conspiracy has been found to be a crime involving moral turpitude where the objective of the conspiracy is a crime of moral turpitude. *See Jordan v. De George,* 341 U.S. 223 (1951); *see also Omagah v. Ashcroft*, 288 F.3d 254 (5th Cir. 2002), *Matter of Short*, Interim Decision 3125 (BIA 1989). The applicant violated 18 Pa.C.S. § 903(a)(1)(2) when he, "with the intent of promoting or facilitating the commission of the crime of Receiving Stolen Property, did agree with [his co-conspirator], that they, or one or more of them, would engage in conduct which would constitute such crime, or an attempt or solicitation to commit such crime; . . . and did an overt act in furtherance thereof . . . ." Therefore, the applicant's conviction for Conspiracy to Commit Receiving Stolen Property is a crime involving moral turpitude that renders the applicant inadmissible.

The record shows that the applicant was arrested in Reading, Pennsylvania on April 30, 1995 and charged with simple assault, recklessly endangering another person, disorderly conduct and harassment. The applicant was convicted on September 19, 1995 in the Court of Common Pleas for Berks County, Pennsylvania of Disorderly Conduct in violation of 18 Pa.C.S. 5503(a)(1). The applicant was sentenced to a minimum of six days and a maximum of 12 months in jail.

Disorderly conduct is not a crime involving moral turpitude where evil intent is not necessarily involved. See *Matter of S-*, 5 I. & N. Dec. 576 (BIA 1953), *Matter of P-*, 2 I. & N. Dec. 117 (BIA 1944), and *Matter of*

Mueller, 11 I. & N. Dec. 268 BIA 1965). It is also noted that simple assault has frequently been found not to be a crime involving moral turpitude. *See In re O*, 4 I. & N. Dec 301 (BIA 1951); *see also In re B*, 5 I. & N. Dec. 538 (BIA 1953), *Medina v. United States,* 259 F.3d 220 (4th Cir. 2001), *Matter of* [redacted] 23 I. & N. Dec. 590 (BIA 2003). The applicant violated 18 Pa.C.S. § 5503(a)(1) when he, "with intent to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, engage in fighting or threatening behavior or in a violent tumultuous behavior, causing substantial harm or serious inconvenience, or persists in disorderly conduct after reasonable warning or request to desist. . . ." Because 18 Pa.C.S. § 5503(a)(1) is a divisible statute, the AAO can look to the "record of conviction" to determine if the applicant's crime involved moral turpitude. The record of conviction does not contain details of the applicant's offense, though it is noted that the applicant was ordered to have no contact with the "victim" of the crime. The AAO concludes that the statute violated by the applicant does not necessarily require "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man." Therefore, the record does not show that the applicant's conviction for disorderly conduct in violation of 18 Pa.C.S. § 5503(a)(1) is a crime involving moral turpitude.

The record shows that the applicant was arrested in Reading, Pennsylvania on July 3, 1993 and charged with driving under the influence of alcohol or controlled substance (DUI) and careless driving. After completing a 12 month rehabilitation program, the Court of Common Pleas for Berks County, Pennsylvania dismissed the charges. Even assuming that the diversion of the charges allowing the applicant to participate in the rehabilitative program is sufficient to constitute a conviction, or an admission on the part of the applicant of committing the crime, or of the acts which constitute the essential elements of the crime, a simple DUI offense is not a crime involving moral turpitude. *See In re Lopez-Meza* Interim Dec. 3423 (BIA 1999); *see also Matter of Torres-Varela,* 23 I&N Dec 78 (BIA 2001).

Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i) of the Act for having committed the crimes of receiving stolen property and conspiracy to receive stolen property, crimes involving moral turpitude. The applicant has not disputed that he is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> . . . .
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> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The AAO notes that section 212(h) of the Act provide that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives that qualify are the applicant's spouse and stepsons. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying

relative in the application. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted.) Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In her undated initial affidavit, the applicant's spouse indicates that she and her sons are native to the United States, have never been to Mexico, have no family ties there and do not speak Spanish. She asserts that she manages the gas station owned by her husband, used to work in a factory and has retail experience. In her

affidavit dated April 29, 2008, the applicant's spouse indicates that the applicant no longer owns the gas station, but that she has obtained health care benefits through her employer, Lowe's, and has used these benefits to receive treatment for her depression. The applicant's spouse also states in her undated affidavit that her sons consider the applicant to be their father, but have said that they will "run away" if she and the applicant move to Mexico. She indicates that her son [redacted] Attention Deficit Hyperactive Disorder and has participated in special education programs.

In his assessment [redacted] indicates that the applicant's spouse told him that she works full-time at Lowe's and that the company offers her opportunities for advancement and additional training. [redacted] states that the applicant's spouse suffers from attention, learning and mood disorders that place her "at significantly higher risk of developing a diagnosable mental disorder such as Major Depressive Disorder in the event she is separated from" the applicant. He further opines that the given her difficulties with mood, attention and learning, the applicant's spouse "will experience significantly more adjustment problems than the average person if she moves to such a challenging and unfamiliar culture." [redacted] indicates that from his interview with the applicant, the applicant's spouse and her son [redacted] he learned that and the applicant's spouse's other son do not work and "spend many hours a day playing video games." [redacted] was 18 years old and [redacted] was 19 years old at the time of [redacted] evaluation and report on November 20, 2006. [redacted] did not evaluate the applicant's stepson [redacted], but indicates that his stepson [redacted] also suffers from attention and mood disorders. [redacted] believes that [redacted] will also have difficulty in adjusting to a foreign culture where he does not speak the language. [redacted] concludes that the applicant's family "is a very close family but one struggling unsuccessfully with the difficult task of launching two children into adulthood." He further believes that "there is a high possibility that without [the applicant's] presence in the family, both boys will neither complete their education nor go on to productive work for many years to come."

In her letter, indicates that she saw the applicant's spouse on two occasions, diagnosed her with depression and recommended that she continue therapy.

In their affidavit, the applicant's parents state that they live in poverty in Mexico and depend entirely on the applicant for financial support. They assert that salaries for men are very low in their area of Mexico, and that there is no work for women outside the home. They indicate that three families live in their small house, that drinkable water service is available only once every 15 days, and that they do not have gas service.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse and stepsons face extreme hardship if the applicant is not granted a waiver of inadmissibility.

The AAO recognizes that the applicant's spouse and stepsons would suffer emotionally as a result of separation from the applicant if they choose to remain in the United States. However, it has not been demonstrated that this hardship, when combined with other hardship factors, rises to the level of extreme hardship. Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter from [redacted] is based on a single interview between the applicant's spouse, her son [redacted] and the psychologist. The record fails to reflect an ongoing relationship between [redacted] and the applicant's spouse and her son Chris or any history of treatment for the disorders suffered by the applicant's

spouse. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the [redacted] findings speculative and diminishing the evaluation's value to a determination of extreme hardship. [redacted] himself indicates that his report is based "primarily on information obtained from the clients," and that it is "difficult or impossible to verify personal information." Likewise, [redacted] indicates in her letter that she evaluated the applicant's spouse on two occasions, but does not state for how long she spoke with the applicant's spouse or provide details of the sessions other than asserting that the applicant's spouse "presented with a depressed mood, isolating and getting snappy for over a year." [redacted] indicates that she diagnosed the applicant's spouse as suffering from depression, but does not elaborate or provide any analysis of the impact separation from the applicant would have on the applicant's spouse. Even accepting that the applicant's spouse experiences "mood disorders" and possibly even depression, the impact of separation from the applicant on her mental and emotional health remains speculative and is not clearly demonstrated by the evidence submitted. The evidence also reflects that the applicant has health benefits through her employer and is receiving treatment.

There is insufficient evidence in the record showing the extent to which the applicant's stepsons will suffer emotionally if separated from the applicant. [redacted] has indicated that without the applicant, the applicant's stepsons will be less likely to complete school and lead productive lives. However, the evidence does not reflect that, as a consequence of the applicant's presence, his stepsons are doing or have done better in school and preparing themselves for productive work in the future. Rather, as [redacted] indicates, the applicant's stepsons do not work, have refused to work with their stepfather, and spend many hours every day playing video games. The applicant, on the hand, apparently works over 12 hours per day, seven days a week. There is insufficient evidence in the record to support the claim that, in the applicant's absence, his spouse's burden of "launching" her sons into adulthood will be significantly altered as claimed.

The AAO acknowledges the evidence that the applicant's spouse and stepsons are financially dependent to some extent on the applicant, but also notes that the applicant's spouse works, and enjoys health benefits and advancement opportunities through her employer. In addition, it is noted that on his individual 2006 tax return, the applicant listed three daughters as his dependents, daughters not mentioned elsewhere in the record, and a total annual income of approximately $29,000 (rather than the $70,000 reported to [redacted] The affidavit from the applicant's parents indicates that the applicant also supports them financially. Therefore, the amount of the applicant's financial contribution to his spouse and stepsons, if any, and the financial hardship they would experience without it, is unclear from the record.

Viewed cumulatively, the hardship described, and as demonstrated by the evidence in the record, is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

The AAO does recognize that the applicant's spouse and stepsons would suffer extreme hardship if they relocated to Mexico. The evidence shows that they do not speak Spanish and would have significant

difficulty in adjusting to life in Mexico where they have no family or other connections beyond those of the applicant. The evidence shows that the applicant's family experiences severe poverty conditions in Mexico and are supported by remittances from the applicant. The evidence in the record reflects that the applicant's spouse and stepsons are unlikely to have employment prospects or adequate medical care in Mexico. However, as stated above, the record does not reflect that the applicant's spouse and stepsons will experience extreme hardship if they remain in the United States.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse and stepsons as required under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.